IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1116 of 1995

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ARVIND MANEKALAL TAILOR

Versus

STATE OF GUJARAT

Appearance:

MR KH BHAYA for Petitioner

MR KP RAVAL, APP for Respondent No. 1

MR YATIN SONI for Respondent No. 2

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 06/04/2000

ORAL JUDGEMENT

1. This is an appeal under section 378(4) of the Criminal Procedure Code, at the instance of the original complainant, who challenges the judgement and order of acquittal passed by the learned Magistrate, Court No.9, Ahmedabad, in Criminal Case No.677/92, whereby the second respondent herein was acquitted in respect of the offence

under section 138 of the Negotiable Instruments Act.

2. The principles laid down by the Supreme Court as regards the proper approach and perspective in relation to appeals against acquittals are by now well settled and do not require a detailed discussion. Suffice it to say that the appellate courts are under an obligation not to allow such appeals lightly or on a casual basis, unless the findings recorded on the basis of the evidence on record are grossly unjust, patently unsustainable or based on no evidence at all. On the facts of the present case I find that such is not the case.

3. The facts which are not in dispute and/or indisputable are as under:

3.1 The accused had issued a cheque in favour of the complainant dated 15th March 1991 for Rs.2 lacs (Exh.16), representing part of the purchase price of three shops, purchased by the accused from the complainant, who was a builder and developer of the shops in question. Thereafter i.e. after the cheque was issued bearing the date 15th March 1991, certain events transpired which will be discussed hereinafter, whereby the very same cheque was altered by the drawer so as to change the date from 15th March 1991 to 15th September 1991. The only significance of this aspect of the matter is that certain events between 15th March and 15th September 1991 had occurred and the intervening developments led the parties to alter the due date on the cheque from 15th March to 15th September 1991.

3.2 The complainant presented the said cheque by paying the same into his bank account on 1st November 1991. Since the drawer had issued the cheque from his own account held in the same bank and same branch as the drawee, the bank of the drawee returned the cheque to the drawee with the endorsement "stop payment directions issued" by a return memo (Exh.10) on the same day.

3.3 The complainant, therefore, issued a notice to the accused-drawer of the cheque under section 138 of the Negotiable Instruments Act (Exh.16), which appears to have been received by the drawer-accused on 2nd November 1991. The accused replied to the said notice of the complainant by reply dated 21st November 1991 (Exh.21). Obviously, since the notice under section 138 was not complied with by the accused, the complainant filed a complaint before the Criminal Court on 26th November 1991 (Exh.1).

3.4 The Court then directed an investigation by the concerned police officer, Navrangpura Police Station, Ahmedabad, under section 202 of the Criminal procedure Code and on receiving the report, directed the complaint to be numbered as Criminal Case and issued process thereon, being numbered as Criminal Case No.677/92. After recording the evidence in the said case the learned Magistrate delivered the impugned judgement and order of acquittal under section 255 of the Criminal Procedure Code. Hence the present appeal.

4. Learned counsel for the appellant-complainant has cited a number of decisions, all of which are not relevant for the purpose of the controversy at hand. He has sought to rely upon a decision in the case of M/s Modi Cements Ltd. Vs. Kuchil Kumar Nandi, reported at AIR 1998 SC 1057, wherein the Supreme Court has observed to the effect that where a cheque is issued by a drawer and the drawer then gives notice to the drawee or to the bank for stoppage of payment, the same would not preclude an action under section 138 by the drawee. This decision is clearly and specifically based upon a presumption under section 139 in favour of the holder, and clarifies the implications of such situation by holding that merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment, it will not preclude an action under section 138, that the object of section 138 to 148 of the Act is to promote efficacy of banking operations and to ensure credibility in transacting business through cheques. The same decision further goes on to observe (paras 20 and 21) that the drawer of the cheque undoubtedly gets an opportunity under section 139 of the act to rebut the presumption at the trial.

5. Learned counsel for the appellant also sought to rely upon a decision of the Madras High Court in the case of M/s Ruby Leather Exports Vs. K. Venu Rep. Vandana Chemicals, reported in 1994(1) Crimes 820. This decision lays down the principle that any part payment in respect of the dishonoured cheque which is made after the issuance of the statutory notice under section 138 of the Negotiable Instruments Act does not destroy the cause of action which arose on the dishonour of the said cheque. There cannot be any controversy as to this proposition. However, the fact remains that this decision has no bearing on the facts of the case inasmuch as it is neither the case of the complainant nor the case of the accused that any part payment in respect of the dishonoured cheque has been made after the issuance of the notice under section 138 of the said Act.

6. Learned counsel for the appellant has also sought to rely upon a decision of the Calcutta High Court in the case of M/s Ancon Engineering Co. (P) Ltd. Vs. Sri Amitava Goswami in Criminal Revision NP 2532/1992 decided on 17th February 1993, reported in Judgements on Dishonour of Cheques, page 8, which lays down the identical principle as laid down by the Madras High Court in the case of M/s Ruby Leather Exports (supra). This decision is also irrelevant for the same reasons as stated hereinabove.

7. The crux of the matter in the present appeal is the appropriate construction of section 138 of the Act when seen in the context of the presumptions raised by sections 118 and 139 of the said Act. There is no doubt that section 118 as also section 139 create presumptions.

7.1 Section 118 creates a presumption in favour of consideration behind the issuance of the cheque. In other words, it creates a presumption that the drawer of a cheque is a debtor in respect of the amount of the cheque, wherein the drawee is the creditor. Section 139 creates a corresponding presumption in favour of the holder of the cheque. It would, therefore, appear that the presumptions created by section 118 and section 139 are only permissible presumptions in law from different perspectives. However, there cannot be any controversy and in fact there is no controversy that both presumptions are rebuttable.

8. Now coming to the crux of the matter and the factual controversy involved in the present appeal, the impugned judgement of acquittal is based upon the acceptance on the part of the trial court of the defence put up by the accused to the effect that the dishonoured cheque was not in respect of "discharge, in whole or in part, of any debt or other liability" within the meaning of section 138 of the said Act. The trial court, after discussing all the facts and factual materials on record, came to the conclusion that the cheque issued for Rs.2 lacs did not represent either the whole of the debt or other liability of the drawer towards the drawee, nor did it represent part of such debt or liability.

8.1 No doubt, the trial court has in its judgement (delivered in Gujarati) has very often used the phrase to the effect that the cheque does not represent the "legal dues" of the drawer to the drawee. However, there cannot be any controversy that the entire factual evidence is based upon not the issue as to whether there is any debt

or not, but on the defence of the accused that after the issuance of the cheque, but before due date, there was a change of circumstances and change in the obligations between the parties whereby the extent of the debt and the quantum thereof was substantially altered, and that on the due date the debt if any of the drawer to the drawee was of a far smaller figure. Obviously it was neither the function of the criminal court nor necessary to decide the legal issue as to what was the precise extent of the debt. If the evidence in rebuttal which is found acceptable by the court justifies a conclusion that the cheque which was dishonoured, did not represent either the entire debt or part of the debt on the due date, section 138 would not furnish a cause of action for the criminal prosecution and/or conviction. It is in the context of this limited controversy that the evidence in rebuttal led by the accused has been examined and found to be acceptable by the court.

9. So far as the facts of the case are concerned and so far as the appreciation of evidence is concerned, I see no reason to take another view of the matter, so far as the findings of fact are concerned. Suffice it to say that the finding of fact based on the evidence on record is to the effect that when the cheque was issued, the same represented an amount due and payable to the drawee in respect of the outstanding consideration in respect of the shops sold by the drawee to the drawer. However, subsequently, after the issuance of the cheque, but before the due date, the parties readjusted their mutual obligations as evidenced by Exh.24, etc., and the drawer of the cheque made payments in respect of the then outstanding amount in respect of the shops purchased by him by instalments as also interest, which payment has been accepted by the drawee. The evidence on record discloses that the cheque was originally issued on the understanding that the drawer as a purchaser of the shops would be able to obtain bank loans, on the basis of supporting documents to be provided by the complainant; however, since the complainant did not or could not provide the necessary documents, the bank loan although sanctioned, was not disbursed, and therefore the accused was unable to get the amount and therefore could not redeem the cheque from the drawee before the due date. It was for this reason that the drawer of the cheque followed the alternate arrangements and instead of making the lumpsum payment from the loan amount expected, made payments towards his debt in smaller sums by way of the instalments and also paid interest. This finding is based on a concrete documentary evidence in the form of an agreement between the parties at Exh.24 which

contemplates that if the bank loan is not sanctioned, the purchaser (the drawer of the cheque) would make payments by monthly instalments. There is no dispute that the bank loan, although sanctioned in principle, was not disbursed, and this was because the relevant documents were not or could not be provided by the complainant. It was for this reason that the accused made payments by instalments as contemplated by Exh.24. It is also not in controversy that payments by instalments together with interest has been accepted by the complainant, impliedly as of right under Exh.24, and without protest.

10. It requires to be noted that as a result of these readjustments between the parties, the accused made monthly payments by instalments by cheques. It is stated that two of such cheques were honoured and subsequent cheques were dishonoured. Specifically in respect of these dishonoured cheques further complaints under section 138 have been filed. Furthermore, the complainant has also filed a civil suit against the accused in respect of these civil transactions between the parties.

11. The sum and substance of the findings of fact recorded by the trial court are found in paragraph 22 of the impugned judgement. It only requires to be clarified that when the trial court uses the phrase "legal dues" in the context of the cheque in question, it only meant, and it could only mean that the amount of the cheque did not represent "in whole or in part of any debt or other liability" of the drawer to the drawee.

12. In my opinion, the judgement and order of acquittal is eminently justified not only on the facts of the case, but in view of the interpretation of section 138 of the Negotiable Instruments Act as expressed by me hereinabove. This view expressed by me gets support from a decision of the Andhra Pradesh High Court in the case of Voruganti Chinna Gopaiah Vs. M/s Godavari Fertilizers & Chemicals Ltd., reported in 1999 Criminal Law Journal, page 1184, wherein the facts of the case are almost identical.

13. In the premises aforesaid I find that the judgement and order of acquittal impugned in the present appeal is eminently sustainable, and that therefore there is no substance in the present appeal. The same is accordingly dismissed.

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